

STAFF REPORT

RESOLUTION APPROVING
CLEANUP AND ABATEMENT ORDER NO. R5-2005-0711
FOR
PRESTON AND LOIS AVERY
CONTRA COSTA COUNTY

INTRODUCTION

Preston and Lois Avery of 10315 Moretti Drive, Cupertino, CA 95014 (hereafter Discharger) owns approximately 70-acres of land on Willow Road West, Bethel Island in Contra Costa County (APN 029-010-017). The Discharger has been filling wetlands on the property for 11 years. The property is in Section 3, Township 2 North, Range 3 West, MDB&M. Surface water discharges to Piper Slough, and the San Joaquin Delta near Franks Tract. The property has been identified by the Corps of Engineers in 1994 and 2005 as consisting of 70-acres of “waters of the United States, including wetlands”.

On 10 June 2005 the Executive Officer issued Cleanup and Abatement Order No. R5-2005-0711 (CAO) to Preston and Lois Avery. Preston Avery filled wetlands, waters of the state, without the necessary permits from either the Corps of Engineers or the Regional Board. The CAO requires the Discharger to cease discharging waste to wetlands and other waters and to restore the filled wetlands by 30 September 2005. The Discharger has failed to comply with the CAO and has petitioned the State Water Resources Control Board to review the CAO.

In the petition to State Board the discharger alleges that their property is not a wetland and that petitioners are engaged in activities to maintain drainage improvements and that these activities have been permitted by Contra Costa County. A hearing before the Regional Board will provide the discharger an opportunity to present evidence to the Regional Board regarding the CAO. Regional Board staff has proposed that at the conclusion of this hearing, the Regional Board adopt a Resolution Approving the Cleanup and Abatement Order.

HISTORICAL OVERVIEW

On 27 May 2005, Regional Board staff, responding to local complaints, inspected the property and observed a backhoe operator installing culverts and filling wetlands with soil and other earthen materials. On 28 May 2005, as reported by neighbors, truckloads of fill material were dumped on the property. On 29 May 2005, Regional Board staff observed the Discharger pushing the soil and sediment into waters of the state “wetlands.”

The U.S. Army Corps of Engineers (Corps) in 1994 determined the area contained jurisdictional wetlands. The Corps issued an order requiring the Discharger to cease wetland fill activities, remove fill material and to obtain an “after-the-fact” Section 404 permit for the activities. The Discharger failed to remove the fill material and over an eleven-year period accepted earthen materials, soil and sediment, which was discharged to wetlands.

On 7 September 2005 the Corps issued a subsequent letter indicating that it considered the unauthorized discharges to be "...willful and flagrant." The Corps determined that 70-acres of waters of the United States, including wetlands are present on the Discharger's project area. The Corps also determined that approximately 6 acres of wetlands had been filled and again directed the discharger to cease and desist from any additional discharges of fill material into wetlands adjacent to Piper Slough.

During a 6 July 2005 inspection of the site staff found a number of dominant species of wetland plants and grasses. Some of the more common ones that were observed included Italian Ryegrass (*Lolium multiflorum*), Rabbitfoot Grass (*Polypogon monspeliensis*), nutsedge (*Cyperus* spp), and Saltgrass (*Distichlis Spicata*). These observations were used to support the Corps 7 September determination that the Discharger's lands include wetlands. Photos submitted by neighbors show a large dump truck, which became stuck in soft soils while discharging soil to the wetlands on the Discharger's property.

The discharge of soil and sediment deposited into waters of the state constitute "waste" as defined in California Water Code section 13050. The Discharger, who owns and operates the site, has discharged waste, i.e., earthen material, soil, and sediment, directly into surface waters. The Discharger, through this activity, has caused waste to be discharged where it has caused a condition of pollution or nuisance by increasing levels of sediment, settleable and suspended material.

Clean Water Act (CWA) Section 404 requires any person proposing to discharge dredged or fill material into navigable waters of the United States to obtain a Section 404 permit prior to such discharge. CWA Section 401 requires that any person obtaining a Section 404 permit, obtain water quality certification from the State in which the discharge occurs. California Water Code (CWC) Section 13376 requires, that any person who is proposing to discharge pollutants or dredged or fill material into waters of the state to submit a report of waste discharge pursuant to CWC Section 13260 prior to such discharge. The Discharger failed to obtain a Section 404 permit, a Section 401 Water Quality Certification and failed to file a Report of Waste Discharge.

The discharge alleges in their petition to the State Water Board that it has complied with the permit requirements of Contra Costa County. However, on 28 May 2005, Contra Costa County issued a stop work order for un-permitted grading, requiring the Discharger to cease activities prior to obtaining a grading permit.

On 7 June 2005, Regional Board staff received a complaint that tires and other waste were being discharged as part of the fill materials. Subsequent complaints of continued discharge have also been received.

COMPLIANCE

While the Discharger did not request the State Water Board to stay the requirements of the CAO the Discharger has failed to comply with the CAO. The Discharger continues to violate the CAO on a daily basis. Under CWC Section 13350, the discharger may be liable

for an administrative civil liability of up to \$5,000 per day for failure to comply with the CAO. The daily violations of the CAO began on August 1 due to the failure of the Discharger to submit a Cleanup and Restoration plan. The Discharger also failed to file a Report of Waste Discharge as required by CWC Section 13260 for the discharge of waste to waters of the State.

The Discharger is also in violation of CWC Section 13376 which requires, that any person who is proposing to discharge pollutants or dredged or fill material into waters of the state to submit a report of waste discharge pursuant to CWC Section 13260 prior to such discharge. The Discharger failed to submit a report of waste discharge and failed to obtain a Section 401 Water Quality Certification.

Recommendation

Regional Board staff recommends that the Regional Board adopt a resolution approving Cleanup and Abatement Order No. R5-2005-0711.